No. 12914

United States
COURT OF APPEALS
for the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*

KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee.*

REPLY BRIEF OF CROSS-APPELLANT AND APPELLEE KATHLEEN HUTCHENS

Appeal from the District Court of the United States for the District of Oregon.
HON. GUS SOLOMON, *Judge.*

HARRY GEORGE, JR.,
EMERSON U. SIMS,
600 Henry Building,
Portland 4, Oregon,
WILLIAM A. BABCOCK,
Public Service Building,
Portland 4, Oregon,
Attorneys for Cross-appellant and Appellee.

JAMES ARTHUR POWERS,
NORMAN N. GRIFFITH,
1935 S. W. 12th Ave.,
Portland 1, Oregon,
For Appellant and Cross-appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8–51

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I.

Where a District Court had no power to order a remittitur, a conditional remittitur does not bar an appeal.

(The cross-appellant, hereinafter referred to as Mrs. Hutchens, here is answering the argument generally set

out under Point 1 in the brief of cross-appellee, hereinafter referred to as Johnson Corporation, on pages 4 through 9.)

The Johnson Corporation, in its argument, relies upon federal cases, most of which were prior to *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, 58 S.C. 817, 82 L. Ed. 1118 (1939), and all but three of which were prior to *Guaranty Trust v. York,* 326 U.S. 99, 65 S.C. 1464, 89 L. Ed. 2079 (1945). In general the Johnson Corporation has not been responsive to the argument stated by Mrs. Hutchens. Mrs. Hutchens has argued in her original brief that the trial court below, on the basis of the reasoning of the *Guaranty Trust* case and Amended Article VII, Section 3, of the Oregon Constitution, had no power to order a remittitur.

In the cases cited by Johnson Corporation, the question of the power of the federal trial court is not at issue. Even in the case of *Rice v. Union Pacific Ry. Company,* 82 F. Supp. 1002, which case is most in point for Johnson Corporation's position, there was no indication that the State law was different from the federal practice; for this reason the issue found in the present case concerning whether the federal trial court had the power of ordering a remittitur was not before the Nebraska federal trial court in the *Rice* case. The two other cases cited by the Johnson Corporation which were subsequent to the *Guaranty Trust* case were: *Fornwalt v. Reading Company,* 79 F. Supp. 921 (E.D. Pa., 1948), which was an action under the Federal Employers' Liability Act, in which the federal trial court properly fol-

lowed the federal rules; *Mattox v. News Syndicate Company,* 176 F. 2d 897 (2d C.A. 1949), in which case there was no indication that the state rule on remittitur differed from the federal practice and the issue presently before this Court was not raised.

To state this general proposition in another manner, it is Mrs. Hutchens' position that all cases cited by the Johnson Corporation were distinguishable from the present case where Mrs. Hutchens filed a conditional remittitur, because here Mrs. Hutchens has raised objection to the power, as distinguished from the procedural right, of the federal trial court to direct a remittitur in the first instance.

II.

The trial court had no right to require the particular remittitur delivered in this case.

(Mrs. Hutchens here is answering argument No. 2 set out in the Johnson Corporation's Brief, pages 10 through 16.)

Mrs. Hutchens feels that the analysis found on pages 9 through 22 of the original brief fully reply to the Johnson Corporation's contentions in this subdivision of its answer brief.

All of the cases cited in this section were decisions rendered prior to the *Guaranty Trust* case, with the exception of the three cases discussed and distinguished in the preceding section of this brief.

III.

The right of the Federal District Court to require a remittitur as a condition for avoiding a new trial in a case arising under State law either exists or does not exist according to whether the exercise of such right would substantially change the outcome of the litigation had it been brought in the State court in which the right arose.

(Mrs. Hutchens here is answering the Johnson Corporation's argument (3) found on pages 17 through 33.)

Throughout the Johnson Corporation's argument in this section of its brief, the Johnson Corporation assumes its answer by assuming that the right to direct a remittitur is procedural and then it draws the admitted conclusion that procedural matters are determined by the law of the court of the forum. This argument presupposes its own conclusion. As Mrs. Hutchens pointed out in her opening brief, the U. S. Supreme Court has held that the matter is not one to be decided by the old conflict of laws concept of substance and procedure. (See argument (3) beginning on page 22 of Mrs. Hutchens' original brief.)

On pages 24 to 29 the Johnson Corporation has argued that the 7th Amendment to the Constitution is controlling in the present case. This again assumes the answer sought in the present controversy. The Johnson Corporation seems to argue on page 28 that the rule which the federal district court must follow in the State of Oregon cannot be the same as the Oregon rule because the Oregon rule concerning the right of the trial

court to review the findings of a jury stands as "a lonely eminence." It is contended by Mrs. Hutchens that this in no way meets the issue before this court.

On pages 29 to 31, the Johnson Corporation argues that the Oregon court's characterization of the relation between the judge and jury is not controlling upon the Federal courts in this case. Mrs. Hutchens cited *Hust v. Moore-McCormick Lines, Inc.,* 180 Or. 409, 177 P. 2d 429, as being a converse situation and purely informative to show in what manner other courts have chosen to divide the function of judge and jury. Mrs. Hutchens will agree that when a defense is based upon the Constitution of the United States, Federal decisions are binding; however, she reiterates that the *Guaranty Trust* case and subsequent decisions following that case support her position in the present controversy.

On pages 31 to 33, the Johnson Corporation argues that Mrs. Hutchens recovered on a common law right and relies upon *Hansen v. Hayes,* 175 Or. 358, 154 P. 2d 202. At page 398 of that decision, the Oregon court points out that the Employer's Liability Act creates a new cause of action and in its prior discussion that court held that there was no action after death at common law. It is Mrs. Hutchens' contention that any death act which is interpreted as creating a new cause of action is in derogation of the common law; and that, therefore, Mrs. Hutchens' present cause of action exists purely because it is an Oregon statutory creation.

The cases cited in this section of the Johnson Corporation's answer brief, with the exception of the Oregon

cases cited for the substantive of law contained therein, may be briefly analyzed as follows:

Again most of the cases cited are prior to the *Guaranty Trust* case; of the remaining cases, the three cases distinguished in Section 1 of this brief have been recited in this section. In *United States v. Fotopulos,* 180 F. 2d 631 (9th CA, 1950), the action was brought under the United States Federal Tort Claims Act and State law was used to measure negligence, but Federal procedure was properly used by the Federal court since by Congressional Act it was the only forum available for the trial. It may be noted that there was no jury involved in this case. In *Windor v. Daumit,* 179 F. 2d 475 (7th CA, 1950), which was cited on page 18 of the Johnson Corporation's brief, the court was discussing the effect of the Federal Rules in cases where they conflict with prior statutes of Congress. In *California Fruit Exchange v. Henry,* 89 F. Supp. 580 (WD Pa., 1950), there was no indication that the State rule and the Federal practice concerning the right to direct a remittitur differed and therefore the issue before the present court was not raised. In *Raske v. Raske,* 92 F. Supp. 348 (Minn. 1950), the same objection exists as is found in the preceding case. In *Logan v. Holman,* 7 F.R.D. 596 (N.J. 1947), the matter before the court was whether the question of fraud should be tried by the jury or by the court; in its discussion the court relied upon the old procedural-substantive distinctions and failed to recognize the holding of the Supreme Court in the *Guaranty Trust* case.

The two remaining cases cited on page 32 of the Johnson Corporation's brief were cases already discussed in Mrs. Hutchens' original appeal brief.

In looking to Cyclopedia of Federal Procedure for aid, we find that the holding of the *Erie R. R. Company* case, was that the decisions of the State courts should control in matters involving substantive law. The evil which the *Erie* case sought to avoid is the alteration of substantive rights by choice of forum and that evil cannot be present where the rule involved concerns a policy of administration rather than a right of litigants.

Congress is without power to declare what rules of substantive law shall govern the federal courts in diversity cases and neither Congress nor the Supreme Court has power to declare a state rule of substantive right to be other than the courts of the state have established, nor can they undermine such a substantive rule or destroy it by procedural requirements. Quoting *Francis v. Humphrey,* 25 F. Supp. 1.

While the line between procedure and substantive law is said to be foggy, it has been suggested that the federal court should consider the state court's classification of the matter, at least to the extent that it should not hold a matter procedural if the state courts do not.

Past authorities dealing with the dividing line between substantive and procedure, are relatively of small value in the present connection because they were expressions of the needs of the particular situations not analogous to the present in which may be found the

clue to the point of view that should be taken. *Sampson v. Channell,* 110 Fed. 2d 754, 128 A.L.R. 394, suggests,

> "Hence the greater likelihood there is, that litigation would come out one way in the federal court, and another way in the state court, if the federal court failed to apply a particular local rule, the stronger the urge would be to classify the rule as not a mere matter of procedure but one of substantive law falling within the mandate of the *Tompkins* case."

A suggested test that has met much favor, called the "Uniformity of Result Test" is, that matters potentially capable of bringing about a result in a federal court different from that in the state court, should be classified as substantive, with its corollary that matters not calculated to affect the result but which relate primarily to the mechanics of formation of the issues should be held procedural.

Federal courts are not free to follow their own views in questions involving a conflict of laws but must defer to the state law of conflict of laws in its entirety. In *Klaxton Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487, Justice Reed said, in a case tried in Delaware, involving the question of whether New York law making the addition of interest on judgments mandatory or the law of Delaware was to be applied, said:

> "We are of the opinion that the prohibitions declared in the *Erie R. R. Company v. Tompkins* against such independent determination by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those pre-

vailing in Delaware state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of conformity within a state upon which the *Tompkins* decision is based."

We further find in Goodrich, The Conflict of Laws, 2d Ed., page 24:

> "Thus (as a result of the Tompkins case) today the federal courts have no independent rules of common law and, therefore, conflict of laws, but must follow the rules established in the state courts of their districts. The final result is proper and desirable. It prevents a difference in the decision depending upon whether suit is brought in the state or federal courts and more possibility of divergence based upon the fortuitous event of the forum chosen has been abolished." (See 128 A.L.R. 404.)

In the field of evidence, the court, in *Howard v. U. S.*, 185 Fed. 2d 986, held that state law presumptions were so bound together with local property rights that failure to apply them would result in serious interference with local substantive law.

And speaking of the right of trial by jury, in *Ross v. Service Lines, Inc.*, 31 Fed. Supp. 871, involving the issue of a fraudulent release, the court said:

> "I take it that since *Erie v. Tompkins* the remedies of the parties in Illinois should be determined as the law of that state directs, unless in violation of some federal statute. The existence or non-existence of a certain remedy and the determination of its character as between law and equity involve more than mere procedural questions."

Even in the case of new trial, which is usually considered a matter of procedure, nevertheless the situation can arise in which refusal by the federal courts to recognize grounds for new trial which state courts would hold determining can be viewed as an infringement upon substantive rights. *Equator Mining and Smelting Co. v. Hall,* 106 U.S. 86.

Throughout the entire field, the principle runs, as expressed in the *Guaranty Trust* case, the intent of the *Erie* case was to insure that in all cases where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties, the outcome of the litigation should be the same, so far as the legal rules determining the outcome of the litigation, as it would if tried in a state court. In the state of Oregon a court is not permitted to reduce a verdict solely because the court viewed the jury's verdict as excessive.

Reduced to its simplest terms, Mrs. Hutchens' contention is that in the State of Oregon the state courts are without power to reduce a jury's verdict solely upon the ground that the court thought it excessive. Therefore, a federal court sitting in Oregon, trying a case arising in Oregon, involving a resident of Oregon, under an Oregon statute, is likewise without power to reduce the jury's verdict.

SUMMARY

It is Mrs. Hutchens' contention that the United States Supreme Court has directed that the result in diversity cases should be substantially the same as the result would have been had the case been tried in a state court. It is her position that in the present case there could have been no remittitur directed had the case been tried in the courts of the State of Oregon. For this reason the Federal trial court below had no power to direct a remittitur. The fact that Mrs. Hutchens filed a conditional remittitur in order to appeal this lack of power of the court below distinguishes her situation from the remittitur cases cited by the Johnson Corporation. Mrs. Hutchens feels that the procedural manner in which she acted was her only available remedy under the circumstances to protect her rights as declared by the United States Supreme Court in the *Guaranty Trust* case where the court said,

> "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal instead of in a State court a block away should not lead to a substantially different result."

CONCLUSION

For the reasons stated in Mrs. Hutchens' opening brief and in this brief, it is submitted that the court below erred in respect to each specification of error presented and that therefore the judgment of the court below should be reversed and a judgment should be entered by this court consonant with the verdict returned by the jury in the court below.

Respectfully submitted,

EMERSON U. SIMS,
HARRY GEORGE, JR.,
WILLIAM A. BABCOCK,
Attorneys for Cross-Appellant
Kathleen Hutchens.